UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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GEORGE SCHUCK, JR. as Chairman of the JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and its participating Funds,

Plaintiff,

- against -

DAK Electric Contracting Corp., Donald A. Kopec and Alan Walker,

Defendants.
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MEMORANDUM AND ORDER
CV 95-2454 (ILG)

After defendant DAK Electric Contracting Corporation ("DAK") failed to make certain contributions on behalf of its employees for various employee benefits, George Schuck, Jr. ("Schuck"), the Chairman of the Joint Industry Board of the Electrical Industry ("JIB") and a fiduciary to these plans, brought suit against DAK and two individuals, Donald A. Kopec ("Kopec") and Alan Walker ("Walker"), both of whom are or were principals of DAK. Plaintiff now moves for summary judgment and Walker cross-moves for partial summary judgment. For the following reasons, plaintiff's motion is granted in part and denied in part and Walker's cross-motion is granted.

FACTS

DAK executed a Collective Bargaining Agreement with the

International Brotherhood of Electrical Workers, Local Union No. 3. Pl. 3(g), ¶ 3; Walker 56.1, ¶ 1.[1] At that time, and at all times material to this motion for summary judgment, Kopec served as President and Walker as Secretary of DAK. Pl. 3(g), ¶ 2; Walker 56.1, ¶ 1. Because certain employee benefits plan contributions were not made by DAK – the precise amounts are in dispute[2] – DAK and S huck entered into a forbearance agreement on February 3, 1995. Pl. 3(g), ¶¶ 4,8; Walker 56.1, ¶¶ 1,4. In

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[1] Kopec has not submitted the statement required by Local Rule 56.1. The Kopec Affidavit is itself "submitted by Donald Kopec individually and as an officer of DAK"; no other papers have been submitted on behalf of DAK.

[2] Plaintiff claims that the delinquent contributions are for the week ending October 19, 1994 through the week ending November 16, 1994 (totaling $301,416.82) and for the week ending March 8, 1995 through the week ending April 26, 1995. The total amount of delinquent contributions, plaintiff claims, is $592.333.53. Pl. Amended 56.1, ¶ 8. Walker, while disputing the amount set forth in plaintiff's original 3(g) statement, "acknowledges that DAK failed to make certain contributions on behalf of its employees during certain periods." Walker 56.1, ¶ 4.

addition, Kopec and Walker executed and delivered a guaranty of performance of DAK's obligations under the forbearance agreement. Pl. 3(g), ¶ 5; Walker 56.1, ¶ 2.

I. Forbearance Agreement and Guaranty

In the forbearance agreement – which was signed by Schuck, Kopec and Walker – "DAK acknowledge[d] and agree[d] that it is bound by the terms of the CBA" and "that it owes JIB a sum set forth hereinafter for delinquent contributions for benefit plans administered by JIB." Treanor Aff., Ex. 1. The forbearance agreement specifies that the delinquent contributions total $551,416.82 and represent contributions that should have been paid for "the weeks ending October 19, 1994 through and including November 16, 1994." Id. It also provides that "DAK, Donald A. Kopec, and Alan Walker acknowledges [sic] that JIB has a legal right to commence an action against them in the United States District Court for the Eastern District of New York for delinquent contributions . . . and DAK has no defenses to such an action." The forbearance agreement also provides that "interest will continue to accrue on all outstanding balances until paid at the rate of ½% above the published prime rate published by Citibank, N.A. on the first day of each quarter, interest to be compounded weekly" and that Kopec and Walker "acknowledges [sic]

that they are the president and secretary, respectively, of DAK and two of the largest shareholders of DAK and as such they are personally liable for wages and contributions owed to employee benefit plans on behalf of its employees." Id.

After setting forth a payment schedule[3], the forbearance agreement provides as follows:

> DAK agrees that its failure to tender any payment within three (3) days from the dates specified above shall constitute a default under this **FORBEARANCE AGREEMENT** as well. In the event of a default . . . the JIB shall be entitled to commence an action against DAK, its president Donald A. Kopec and, its secretary Alan Walker in the United States District Court, Eastern District of New York . . . for breach of this **FORBEARANCE AGREEMENT** to recover the full amount of the indebtedness, plus interest less any payments made. JIB's failure to avail itself of this remedy in the case of any one or more defaults hereinunder shall not constitute a waiver of JIB's right to avail itself of this remedy in the event of a future default. In addition, DAK acknowledges that JIB may avail itself of all remedies as provided under the CBA, law and inequity [sic].

Id.

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[3] In particular, the forbearance agreement sets forth a schedule for repayment of the delinquent contributions at issue, interest and attorneys fees (the latter, in the amount of $300.00).

Kopec and Walker also executed a guaranty, which was annexed to the forbearance agreement, pursuant to which they "guarantee[d] to JIB, the full performance and observance of all the provisions hereby provided to be performed and observed by DAK."

II. Walker's Involvement with DAK

Walker avers that although he was DAK's Secretary for several years, he was "never responsible for the company's administrative functions including the negotiation of the CBA or DAK's payroll and benefits responsibilities which were handled by Donald Kopec, the president of DAK, and Steven Heller, DAK's attorney and consultant ("Heller")." Walker Aff., ¶ 3. In March 1994, he resigned from his position at DAK , but returned to DAK in August 1994 after Heller and Kopec told him that the company "had approximately $16 million in receivables as against expenses of $11 million" and that the company needed "a cash infusion, . . . in the form of a loan, to carry the company until some of these receivables came in." Id., ¶¶ 4-5. He then loaned DAK approximately $950,000 between June 1994 and November 1995. Id., ¶ 5. He understood that the money loaned would be used to pay DAK's obligations and, for that reason, "agreed to sign the Guaranty of performance (and not of collection) to plaintiff in

conjunction with the Forbearance Agreement with the anticipation of the receivables indicated to me by Steven Heller and Donald Kopec." Id., ¶ 6. Later, he avers, he "was notified that the $16 million in receivables was not reality." Id.

In March 1995, Walker again left DAK.

III. Commencement of this Action

On June 16, 1995 plaintiff commenced this action by filing a Complaint. The Complaint alleges that (1) defendants have violated 29 U.S.C. § 1145 by failing to make required employee benefit plan contributions and paying interest which has accrued on such delinquent contributions (first, second and third causes of action), (2) that plaintiff is entitled to relief under 29 U.S.C. 1132(a)(3) because of "defendants' failure to submit weekly payroll reports as required to permit plaintiff to accurately compute the amount of Plan contributions due the plaintiff for the periods in question and to determine the benefits owed to defendants' employees" (fourth cause of action)[4]; (3) that Kopec and Walker – as two of the ten largest shareholders of DAK – are personally liable for the delinquent

[4] Plaintiff confirmed at oral argument that these payroll reports have now been made available to him.

contributions pursuant to New York B.C.L. § 630(a)(fifth cause of action); and (4) that Kopec and Walker are personally obligated under the guaranty for the delinquent contributions owed by DAK (sixth cause of action).

As relief, plaintiff asked this Court

> to grant a judgment in his favor and against the defendants permanently enjoining the defendants from failing to meet their obligations under the collective bargaining agreement and the Trust Agreement; directing the defendants to promptly submit all overdue weekly payroll reports to plaintiff; ordering the defendants to pay to the plaintiff delinquent contributions, interest on the unpaid contributions computed from the date contributions became due until the date paid in accordance with the Trust Agreement, past due interest on delinquent contributions, liquidated damages in an amount equal to the said interest on unpaid contributions or 20% of all contributions recovered hereunder, whichever is greater, reasonable attorney's fees and the costs of this action; and granting such further relief as may be just.

Complaint at 7-8.[5]

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[5] At oral argument plaintiff confirmed that because DAK is out of business it no longer wished to pursue its application for an injunction and withdrew it.

STANDARD

Summary judgment under Rule 56 is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of proof on such motion. United States v. All Funds, 832 F. Supp. 542, 550-51 (E.D.N.Y. 1993).

If the summary judgment movant satisfies its initial burden of production, the burden of proof shifts to the nonmovant who must demonstrate that a genuine issue of fact exists for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a jury could return a verdict in its favor. Id. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories,

and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Once the nonmovant has adduced evidence of a genuine issue of material fact, its "allegations [will be] taken as true, and [it] will receive the benefit of the doubt when [its] assertions conflict with those of the movant." Samuels v. J. Mockry, et al., 77 F.3d 34, 36 (2d Cir. 1996).

DISCUSSION

In opposition to this motion, Kopec and Walker argue that they are not liable under any provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and, because plaintiff did not move under the forbearance agreement and guaranty, summary judgment must therefore be denied, Walker Mem. at 8-9[6]. In addition, Kopec and Walker dispute the amounts of the actual debt owed by DAK and the attorneys fees that may be imposed. Kopec Aff., ¶ 23; Walker

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[6] However, at oral argument counsel for Kopec and Walker agreed that it would be appropriate to grant summary judgment as against them, but only on the forebearance agreement (the sixth cause of action).

Mem. at 10-13. Finally, Walker argues that he is entitled to summary judgment on the fifth cause of action – that predicated on New York B.C.L. § 630 – because there is no judgment against DAK and that, in any event, B.C.L. § 630 is preempted by ERISA.[7] We turn first to the liability of Kopec and Walker under ERISA.

Walker contends that there is no personal liability under ERISA and that, for that reason, plaintiff is not entitled to summary judgment.[8] *See* Romney v. Lin, 94 F.3d 74, 80 (2d Cir. 1996)("ERISA nowhere provides for personal shareholder liability"). In response, plaintiff contends that once individual officers have assumed personal responsibility for ERISA obligations they may be held liable. In support of this contention, plaintiff cites to several cases holding that where an individual officer has assumed personal responsibility for ERISA obligations as part of a collective bargaining agreement he

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[7] Because this cause of action is clearly preempted by ERISA, *see* Romney v. Lin, 94 F.3d 74, 80 (2d Cir. 1996), it is not discussed at length and Walker's cross-motion is granted.

[8] At oral argument, Kopec and Walker confirmed that they do not contest the motion for summary judgment insofar as it is directed against DAK.

qualifies as an "employer who is obligated to make contributions to a multiemployer plan." *See, e.g.*, Cement and Concrete Workers District Council Welfare Fund v. Lollo, 35 F.3d 29, 36 (2d Cir. 1994); Employee Painters' Trust v. J&B Finishes, 77 F.3d 1188, 1192 (9th Cir. 1996); Mason Tenders District Council Welfare Fund v. Pistone, 1992 WL 204377, *2 (S.D.N.Y. 1992). Kopec and Walker argue, in response, that the forbearance agreement does not provide for their personal liability under ERISA. Walker Mem. at 9; Kopec Aff., ¶¶ 12-19. We therefore turn to the forbearance agreement and guaranty.

The forbearance agreement has several provisions that are relevant: (1) "DAK acknowledges and agrees that it is bound by the terms of the CBA" and "that it owes JIB a sum set forth hereinafter for delinquent contributions for benefit plans administered by JIB"; (2) "DAK, Donald A. Kopec, and Alan Walker acknowledges [sic] that JIB has a legal right to commence an action against them in the United States District Court for the Eastern District of New York for delinquent contributions . . . and DAK has no defenses to such an action"; (3) Kopec and Walker "acknowledges [sic] that they are the president and secretary, respectively, of DAK and two of the largest shareholders of DAK and as such they are personally liable for wages and

contributions owed to employee benefit plans on behalf of its employees"; (4) in the event of default, "JIB shall be entitled to commence an action against DAK, its president Donald A. Kopec and, its secretary Alan Walker . . . for breach of this **FORBEARANCE AGREEMENT** to recover the full amount of the indebtedness"; and (5) "DAK acknowledges that JIB may avail itself of all remedies as provided under the CBA, law and inequity [sic]." In addition, the guaranty states that Kopec and Walker "guarantee[d] to JIB, the full performance and observance of all the provisions hereby provided to be performed and observed by DAK."

Nothing in the forbearance agreement or guaranty suggests that Kopec and Walker assumed personal liability for purposes of 29 U.S.C. § 1145. Although Kopec and Walker assumed personal responsibility for certain delinquent contributions, any resultant liability applies only to the delinquent contributions set forth in the forbearance agreement and arises solely out of the forbearance agreement and guaranty. Of the relevant statements cited above, the first is simply an acknowledgment of DAK's liability, while the second is an acknowledgment that plaintiff may bring suit – possibly for the delinquent contributions addressed in the forbearance agreement – and that

DAK, but not Kopec and Walker, have no defenses to such an action. The third statement is an acknowledgment that Walker and Kopec may be sued under B.C.L. § 630 for all delinquent contributions.[9] The fourth statement and the guaranty appear to recognize the personal liability of Kopec and Walker for amounts due under the forbearance agreement. Finally, the fifth statement acts as an acknowledgment that "JIB may avail itself of all remedies as provided under the CBA, law and inequity [sic]," in other words, preexisting remedies, which would not include the personal liability of Kopec and Walker.

In short, because the agreement does not provide for the personal liability of Kopec and Walker under ERISA, summary judgment is (1) granted against DAK and (2) granted in favor of Kopec and Walker and against plaintiff on the first three causes of action. *See* Wards Co., Inc. v. Stamford Ridgeway Associates, 761 F.2d 117, 120 (2d Cir. 1985)(in an action on a contract summary judgment may be granted only where the contract is "wholly unambiguous").

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[9] As is noted earlier, B.C.L. § 630 is preempted by ERISA. *See* note 7, *supra*.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is granted as to the first three causes of action insofar as they are asserted against DAK and denied insofar as they are asserted against Kopec and Walker. In addition, (1) summary judgment is granted in favor of Kopec and Walker on the first three causes of action, (2) plaintiff's motion for summary judgment as to the sixth cause of action is granted and (3) Walker's cross-motion for partial summary judgment as to the fifth cause of action is granted.

DAK is therefore liable under ERISA for delinquent contributions and the statutory penalties set forth in 29 U.S.C. § 1145 and Kopec and Walker are liable for the amounts set forth and remaining unpaid in the forbearance agreement.

This action is now referred to the magistrate for an inquest on damages.

SO ORDERED.

Dated: Brooklyn, New York
May 1, 1998

I. Leo Glasser, U.S.D.J.

Copies of the foregoing Memorandum and Order were this day sent to:

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